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IN THE

# Supreme Court of the United States

October Term, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,

*Petitioners.*

*v.*

NOERR MOTOR FREIGHT, INC., et al.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## RESPONDENTS' PETITION FOR REHEARING.

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# Supreme Court of the United States.

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*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## PETITION FOR REHEARING.

Respondents, Noerr Motor Freight, Inc., et al., respectfully petition the Court for the opportunity to reargue their cause in No. 50, October Term, 1960, in which this Court on February 20, 1961 reversed the judgments of the courts below insofar as they had held Petitioners liable for violation of the Sherman Act.[1]

1. This Court's judgment should, in any event, be modified, since it includes reversal of the judgment of the District Court against the New York, Ontario and Western R. R., a defendant which took no appeal.

## I.

### Summary of Grounds for Granting the Petition.

Respondents respectfully submit that:

(1) This Court actually here decided a case which was not before it, and (2) even if the supposititious case which this Court purported to decide had been before it, the decision would still have been incorrect.

This Court assumed that the effort of Petitioners to obtain legislation was the **primary** purpose of their conspiracy, whereas actually the District Court specifically found as a fact, and the Court of Appeals sustained the finding, that the **primary** purpose of petitioners' conspiracy was to destroy Respondents' good will with their shippers and suppliers, and the **secondary** purpose was to obtain legislation with the entire conspiracy being artfully concealed as a legislative drive.[2]

Second, this Court decided that "every combination" now means "every combination except", in plain contradiction (a) to the unequivocal language of the Sherman Act itself; (b) to the Court's construction of that language, through Mr. Justice Black in *United States v. Southeastern Underwriters Association*, 322 U. S. 533, where he wrote,

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2. The District Court found: "The instrumentality or means by which this object was to be achieved was *primarily* by a campaign designed to destroy the good will of the truckers, and, secondly, by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision" (R. 106). The Court further found:

> "The distinct impression of the Court, sitting as a jury, in drawing the inferences from the evidence presented, is that this was a carefully calculated plan under the guidance of competent legal counsel which sought to choose a means of injuring and, if possible, destroying interstate truck competition that would afford the greatest amount of constitutional protection and thereby seek to render it immune from the coverage of the antitrust laws. A further inference to be drawn is that the plan was to be cast in the *guise* of a gigantic legislative campaign in order to attempt to surround it with the protections of the right to assemble, the right to petition the legislature and freedom of speech." (R. 110)

inter alia: "Language more comprehensive is difficult to conceive"; and (c) with particular respect to procuring governmental action, to the decisions in *United States v. Sisal Sales Corp.*, 274 U. S. 268 and *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, relied upon by the courts below and cited to this Court, but nowhere referred to in its Opinion.

Respondents, like the Court, are aware that many railroads are currently subject to financial adversity, but that is no reason for exempting them from the antitrust laws, and as the trial court pointed out, their troubles are largely of their own making because of their refusal to give shippers the services they want and need.

We are also mindful of the fact that the decision here was by a unanimous Court. However, rehearings are not confined to 5 to 4 decisions,[3] and we respectfully suggest that an opinion of a unanimous Court may receive less critical analysis within the Court itself than one which enjoys the consideration of a dissenting Justice before its filing.

Respondents accordingly seek a rehearing on each of the following grounds:

1. the Court assumes facts, necessary to sustain its decision, which are directly contrary to the unchallenged facts as found by the District Court;[4]

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3. See, e.g., *Flora v. United States*, 362 U. S. 145 (original decision 8 to 1).

4. No challenge to such findings was made by Petitioners in their Questions Presented. Issues which might have been raised by a request that the fact findings be reversed or modified were therefore not before the Court. *Irvine v. California*, 347 U. S. 128, 129; *Local 1976 v. N. L. R. B.*, 357 U. S. 93, 96. Because of Petitioners' failure to challenge the findings of fact, Respondents did not print all parts of the record which would support the findings made by the District Court below, findings which are now ignored or reinterpreted by this Court. (See Slip Sheet Opinion, pp. 15-16.) The findings were all affirmed by the Court of Appeals as "soundly based on substantial evidence" (R. 216).

2. the Court's decision is in irreconcilable conflict with certain of its prior decisions, some expressly relied on by the courts below, but not even referred to by this Court in its opinion;

3. the Court's decision and the broad language of its opinion have far-reaching consequences with respect to construction of the Sherman Act, imposing serious limitations on the previously plenary coverage of the Act, which heretofore has been held subject to limitation only by specific Congressionally enacted exemptions;

4. the Court narrowed the construction of the Sherman Act, out of an expressed concern for possible constitutional issues, which a broader construction might raise, although petitioners had not validly raised any constitutional issues in their questions presented, so that as to them the issues were not before the Court.[5]

## II.

**To Arrive at Its Decision, the Court Was Compelled to Disregard the Fundamental Findings of Fact of the District Court Affirmed by the Court of Appeals, and Not Attacked by the Petitioners in Their Questions Presented.**

A District Judge might justifiably be disturbed by the reversal of his decision, not because of what this Court now declares the law to be, but simply because the District Judge while recognizing every case cited by this Court, deemed them inapplicable because of certain findings of fact made after hearing the evidence. This Court now reverses by ignoring the findings of fact actually made by the District Judge. These findings of fact were affirmed by the Court

5. *Irvine v. California*, 347 U. S. 128, 129.

of Appeals and are not even questioned by the Petitioners in their Questions Presented. Petitioners did not even attempt the "almost insurmountable burden" of demonstrating that these findings were "clearly erroneous". *International Boxing Club of New York v. United States*, 358 U. S. 242, 252. Respondents submit that this Court completely erred in its Footnote 18 in which it states:

> "There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement."

Since Petitioners did not attack the findings of fact, Respondents did not see fit to print all of the evidence in the record which supports any particular finding. In other words, this Court has before it substantially only the record as printed by the railroads.

This Court treated the problem before it as one where the primary purpose of the joint action was to seek repressive legislation, characterizing as merely "incidental" the District Court's finding that the purpose of the railroads was "more than merely an attempt to pass legislation. It was the purpose and intention to hurt the truckers in every way possible *even though they secured no legislation.*" (Slip Sheet Opinion pp. 15-16.)

To treat the District Court's findings in the above manner is not only misleading, but diametrically opposed to what that court found. In effect, it permits Petitioners to engage in "the practice of smuggling additional questions" into the case after the grant of certiorari, since Petitioners requested no such modification of the findings. This Court expressly disapproved such practice in *Irvine v. California*, 347 U. S. 128, 129. The District Court actually found that the purpose of the conspiracy was to drive the Respondents out of the long-haul business, and the *primary intent* was to destroy the good will of the truckers with its customers, thereby driving away some of its customers, even though no legislation was ever secured. The District Court stated

that "restated in extremely simple form I have found the following:

> "1. That the defendants combined in and about May 19, 1949 with the intent and object of substantially lessening competition in the long-haul carriage of freight in unreasonable restraint of trade.
>
> "2. That they were joined in this combination by the Byoir organization on or about August 15, 1949 for the same purpose and with the same intent and for a handsome remuneration.
>
> "3. The instrumentality or means by which this object was to be achieved was *primarily* by a campaign designed to destroy the good will of the truckers, and, *secondly,* by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision." (This finding is exactly opposite to what this Court now states was the "primary" purpose of the conspiracy.)
>
> "4. Hundreds of overt acts in furtherance of this plan were carried out throughout the country, and all in furtherance of the same object and design." (R. 106)

Earlier in its opinion, the court below had stated:

> "It is clear from the above, regardless of the success or failure of legislation proposed by the railroads unfavorable to the truckers, that a real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme." (R. 104)

The District Court also found that Petitioners' "immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and *in such a manner as to interfere with business relations between shippers and truckers.*" (R. 101)

In fact, the District Court went so far as to state specifically that the case which this Court now purports to decide was not the case which was before the District Judge, based upon the evidence. The District Court stated:

> "Counsel for all defendants have argued strenuously that since everything done was geared to ultimate legislation, then anything done to accomplish that end was within the protection of the 1st Amendment to the Constitution of the United States and without the orbit of the Sherman and Clayton Antitrust statutes. But this was more than merely an attempt to obtain legislation. It was the purpose (fol. 107) and intent of Messrs. Deegan, Littlefield and Mackie on the one side, and Byoir on the other, to hurt the truckers in every way possible even though they secured no legislation; it was their purpose to restrict the activities of the truckers in the long-haul industry to the greatest extent possible, and finally, if possible, to drive them out of that segment of the entire transportation industry. This feature of the action, which must always be carried in mind and represents the considered finding of the Court in this case, will be discussed at greater length in the legal discussion to follow." (R. 88)

Much of the third party material which the Petitioners caused to be disseminated had nothing whatsoever to do with truck damage to roads or legislation affecting weight limits or road taxes, but instead was devoted to such themes as trucks being subject to frequent accidents, which naturally damaged their cargo and the viciousness and dishonesty of truckers (R. 84-88).

The campaign was directed toward such organizations of *businessmen* as the Rotary, Lions and Kiwanis, among whom were a great many customers of the Respondents.

The trial lasted several months and involved thousands of pages of oral testimony, much of which is not now before the Court because the findings of fact were not challenged

by the Questions Presented. Credibility was an important issue in many instances, a large part of Respondents' case being put in by witnesses associated with the Petitioners and called for cross-examination. The trial court observed these witnesses and was certainly in a much better position than this Court, with only a partial record before it, to determine what was Petitioners' primary purpose and what was their secondary purpose. That is a plain issue of fact involving very little, if anything, by way of legal conclusion, and certainly is much less subject to appellate review than the issue as to what constituted the separate market in the *International Boxing Club* case, *supra*.

Respondents submit that they should have the opportunity to argue this case based upon the findings as actually made by the District Court, not on this Court's erroneous characterization of those findings as "incidental". (Slip Sheet Opinion, p. 16.)

## III.

### This Court's Decision Is Contrary to, and Overrules, Sub Silentio, Prior Decisions of This Court Relied Upon by the Courts Below.

A primary basis for the Court's decision here is its statement that its previous decisions had held:

> ". . . that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government so long as the law itself does not violate some provision of the Constitution.
>
> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating

together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." (Slip Sheet Opinion, pp. 8, 9.)

For this novel proposition this Court cites only *United States v. Rock Royal Co-op*, 307 U. S. 533, and *Parker v. Brown*, 317 U. S. 341. But these cases hel[d], and held *only*, that particular governmental action was valid even though it could be shown that it was brought about as the result of an unlawful combination of competitors. There is not one word in the opinions in those cases which deals with the situation here present, to wit, whether the competitors who obtained such governmental action could be held liable by an injured party under the Sherman Act. The courts below clearly recognized the holdings in those two cases, cited as authority by this Court,[6] but then proceeded to deal with the actual and different situation in this case, relying upon

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6. The District Judge said: "This Court is in complete accord with the principle set forth in those cases. The plaintiffs do not seek to invalidate any legislation nor do they seek to inquire into Governor Fine's motive in vetoing S. B. 615." The District Judge also stated:

"The defendants argue that since they were merely seeking to impose legislation upon the truckers any monopoly that they have obtained by virtue of such legislation would be a legally protected one. In this argument they ignore the fact that their campaign was far more than a mere legislative scheme. They further ignore the principle that legal means may not be used to accomplish an illegal objective. This Court agrees that a legislature has the right and power to legally create a monopoly for the general welfare of the people, and that the recipient of such a (fol. 150) monopoly is legally protected, if his conduct is otherwise legal, as are the responsible government officials carrying out the will of the legislature. Further, the beneficiaries of such a monopoly, within permissible limits, may enforce these rights in the courts. But it is not a mere legislatively-created monopoly that is under attack in this case. It is a conspiracy to destroy a competitor; a conspiracy to destroy his good will; the distortion of facts to further that end; the presentation of distorted and false information to the public and to public officials that

other opinions of the Court which have sustained liability under the Sherman Act although the validity of the governmental action itself was not in question. Unfortunately, these cases are not even cited in this Court's opinion.

The following cases decided by this Court specifically hold that restrictive governmental action, legislative or executive, induced by the joint action of competitors, does not immunize such competitors from liability under the Sherman Act. These cases are:

1. *United States v. Sisal Sales Corp.*, 274 U. S. 268. In that case, the defendants were held to have violated the Sherman Act by means of a monopoly and restraint based substantially on Mexican legislation which they procured and which included:

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are under attack, as well as the fomentation of government restrictions." (R. 127-8)

And he held:

"The plaintiffs have not here limited themselves in their proofs to those injuries proximately resulting from the veto of S. B. 615 in seeking to sustain their cause of action. Their allegations and proofs go far beyond anything so narrow as that executive act. The effect of the campaign to destroy the truckers' good will had a very substantial and direct effect upon interstate commerce and hence this case is beyond the law of the *Okefenokee* case insofar as plaintiffs' ability to sustain their cause of action is concerned. Defendants have earnestly striven to convince the Court, sitting as a jury, that the plaintiffs' entire case (not simply their right to compensatory damages) is limited to complaints of the defendants' attempts to seek legislation and the loss flowing from such. Hence, they seek to bring themselves within the purview of the *Okefenokee* case. In that respect they have failed to convince the Court.

"Further, the truckers do not contend that they have an unrestricted legal right to use the highways; nor are they attempting to alter any decision of any responsible public official. But they did have a legal right to be in the transportation business. Unlike *Okefenokee*, and like *Angle*, the defendants conspired to destroy the good will of their chief competitor in furtherance of their illegal objective, independent of any legislative or executive act . . ." (R. 129-130)

(1) an edict authorizing the defendants' activities;

(2) discriminatory taxes on sisal favoring the defendants; and

(3) a statute restricting sisal production and thus maintaining the value of the defendants' reserves.

The defendants there argued that a restraint achieved through legislation could not constitute a violation of the Sherman Act, on the authority of *American Banana Co. v. United Fruit Co.*, 213 U. S. 327. This Court in *Sisal* rejected the argument, declaring that:

> "'True, the conspirators were aided by discriminatory legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.'" 284 U. S. at p. 276.

About *Sisal*, the District Court in this case stated:

> "In the *Sisal* case the court granted an injunction against several individuals and corporations who by virtue of a conspiracy had obtained control of the importation and sale of (fol. 154) sisal from Mexico and a complete monopoly of the internal and external trade and commerce in that product. Although sisal was a product of Mexico, a foreign country, and the monopoly was effectuated by securing the passage of discriminatory legislation in that country, the court held that the activities in question were in violation of the Sherman Antitrust Act and the Wilson Tariff Act and that the case was not controlled by the *Banana* decision, pointing to the above-referred-to narrow application of the *Banana* doctrine." (R. 131)

Yet now this Court's opinion does not even cite the *Sisal* case.

Perhaps there is a rational distinction between foreign legislation and legislation of a state. As Respondents see the distinction, there would be less reason to apply the Sherman Act to one who achieved a monopoly by foreign legislation than by state legislation, in view of the supremacy of the commerce clause. But at least, Respondents submit, the Court should have considered the case in its opinion, particularly since the courts below found it persuasive and justifiably relied upon it as setting forth the law (R. 130-1).[7]

2. *Georgia v. Pennsylvania Railroad Company*, 324 U. S. 439. There the railroads jointly determined what rates should be charged southern shippers and thereafter went to the Interstate Commerce Commission for approval

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7. The Justice Department itself has always taken the position that a combination to eliminate competition or impose a restraint is not saved from the prohibition of the Act to the extent that it employs legislative devices. *United States v. Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945).

In *United States v. Maryland & Virginia Milk Producers Association, Inc.*, only a few months ago, on remand after the decision of this Court in favor of the government, 362 U. S. 458, a consent decree was entered which enjoined the defendant, *inter alia*, from "engaging or employing any person to present as his own or as any person's other than defendant's the views of defendant concerning the enactment, amendment, repeal or rescission of any legislation or regulation affecting defendant, or from remunerating any person who, without disclosing either that he is presenting the views of defendant or that he is being remunerated by defendant, makes representations to a legislative or regulatory body or who at the express or implied direction or request of defendant makes representations to any organization or association without making either such disclosure; . . ." 1960 CCH Trade Cases ¶ 69,860, § IV(G), (Dist. D. C. 1960).

The record in that case before this Court shows that the complaint in paragraph 22(i) alleged that: "In effectuating the offenses hereinbefore charged, the defendant has: . . . (1) Sought and urged action by governmental agencies for the purpose of excluding or eliminating competition." (Transcript of Record, Vol. 1, pp. 6-7, 17-18; and see also pp. 55-56 for the statement of particulars filed by the Government).

of such rates. Despite this governmental action by a federal body this Court nevertheless held that such joint activity violated the Sherman Act. There the Court said: ". . . under the Anti-trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal . . . The fact that these rates have been approved by the Commission would not, it seems, bar proceedings by the Government." p. 458. And, as discussed below, the railroads were subsequently relieved of the Sherman Act's prohibition of their combination to procure government action only by a Congressional enactment, not by judicial decision, nor by state statute or executive action.

3. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384. In that case (not cited by the courts below) the statutes of Louisiana expressly and clearly provided that an owner of a trademark could fix the minimum retail price of his goods and that this provision could be enforced in Louisiana against one who had not signed the agreement. This Court there recognized that the state statute specifically required the non-signer to observe the price fixed by the trademark owner.[8] This Court held, nevertheless, that such agreements violated the Sherman Act since the Miller-Tydings Act at that time[9] carved out an exemption under the Sherman Act only as to those dealers who actually signed the contract with the owner of the trademark.

In the *Schwegmann Bros.* case, this Court stated with respect to the argument that the state statute conferred an immunity:

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8. The state price fixing statute was clearly valid state legislation and would be enforceable against anyone not engaged in interstate commerce. *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183; *Pep Boys, Manny, Moe & Jack, Inc. v. Pyroil Sales Co.*, 299 U. S. 198.

9. It took subsequent legislation by Congress, not the abortive state legislation, to remove the restrictions on non-signers from the coverage of the Sherman Act.

"The argument is phrased as follows: the present action is outlawed by the Sherman Act—the Miller-Tydings Act apart—only if it is a contract, combination, or conspiracy in restraint of trade. But if a contract or agreement is the vice, then by the terms of the Miller-Tydings Act that contract or agreement is immunized, provided it is immunized by state law. The same is true if the vice is a conspiracy, since a conspiracy presupposes an agreement. That was in essence the view of the Court of Appeals, which affirmed by a divided vote a judgment of a district court enjoining petitioner from price cutting. 184 F. 2d 11.

"The argument at first blush has appeal. But we think it offends the statutory scheme.

"We note to begin with that there are critical differences between Louisiana's law and the Miller-Tydings Act. The latter exempts only 'contracts or agreements prescribing minimum prices for the resale.' On the other hand, the Louisiana law sanctions the fixing of maximum as well as minimum prices, for it exempts any provision that the buyer will not resell 'at the price stipulated by the vendor.' We start then with a federal act which does not, as respondents suggest, turn over to the states the handling of the whole problem of resale price maintenance on this type of commodity. What is granted is a limited immunity —a limitation that is further emphasized by the inclusion in the state law and the exclusion from the federal law of the nonsigner provision. The omission of the nonsigner provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it.

• • •

> "It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See Parker v. Brown, 317 U. S. 341, 350, 87 L. ed. 315, 325, 63 S. Ct. 307." (341 U. S. at pp. 387-389)

Under the principles of these cases, the states themselves cannot by legislation immunize Petitioners from the application of the Sherman Act, so as to permit them to obtain a monopoly of interstate freight, so that Petitioners can certainly enjoy no immunity in seeking to procure such legislation for that unlawful purpose.[10]

Respondents submit that this Court was misled by equating the question whether the legislation procured is valid (*Parker v. Brown* and *United States v. Rock Royal Co-op, supra*) with the question whether the private persons who wrongfully procure such valid legislation may be held liable in damages. This distinction was clearly made in this Court's decision in *Angle v. Chicago, St. Paul, Minneapolis and Omaha Railway Co.*, 151 U. S. 1, another case relied upon by the District Court (R. 123), but not mentioned or dealt with in this Court's opinion. In that case defendant was held subject to tort liability for legislation procured by its deception, to the injury of another, one of the precise issues in this case. The Court stated, at pp. 18-25:

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10. Petitioners' counsel, Mr. Cox, in his oral argument unabashedly admitted that: ". . . what they were doing was trying to get the state legislatures to pass laws that would admittedly limit, *cripple* the competitive power of the trucks." (Transcript of Oral Argument, p. 75.)

". . . The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. . . .

". . . The wrong was not one done by the state or in the act of the legislature in taking away the land grant, but in such proceedings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. . . .

". . . Our conclusions in respect to this matter may be summed up thus: The Portage Company would have completed the work but for the wrongful acts of the Omaha Company. In consequence of the disability thus caused, and also moved by the false representation of the Omaha Company, the legislature resumed its grant and made a re-grant to the Omaha Company. The validity of that act is conceded. It is to be presumed the legislature acted with proper regard to the public interests, and without any improper motives, or inducements. Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. . . ."

## IV.

**The Decision of the Court Limits Judicially the Provision of the Sherman Act That "Every . . . Conspiracy or Combination in Restraint of Trade . . ." Is Unlawful, Whereas All Prior Limitations of That Plenary Language, Apart From the Rule of Reason, Have Been by Express Congressional Enactment.**

This Court, in its opinion, states:

". . . the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." (Slip Sheet Opinion, p. 9.)

• • •

". . . we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." (Opinion, p. 11)

Apart from the Rule of Reason,[11] this is the first time that this Court has given a restrictive meaning to the statutory language, making unlawful "*every* . . . com-

11. It has recently been held that a conspiracy to eliminate a competitor, employing as its means, inter alia, disparagement of the competitor, is a per se violation of the Sherman Act. *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879 (1st Cir. 1960). And even the Rule of Reason cases held the specific combinations there before the court to be in violation of the Sherman Act. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106.

bination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." 15 U. S. C. § 1. In *United States v. Southeastern Underwriters' Association,* 322 U. S. 533, 553-9, this statutory language was construed by Mr. Justice Black as follows:

> "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.
>
> "A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. 'Trusts' and 'monopolies' were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them. The organized opponents of trusts aimed at the complete destruction of all business combinations which possessed potential power, or had the intent, to destroy competition in whatever the people needed or wanted. So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished.
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> ". . . And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power. Cf. Helvering v. Griffiths, 318 U. S. 371, 87 L. ed. 843, 63 S. Ct. 636; Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. ed. 184, 62 S. Ct. 221. We have been shown not one piece of reliable

evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy. Nor is it sufficient to justify our reading into the Act an exemption for insurance that the Congress of 1890 may have known that states already were regulating the insurance business. **The Congress of 1890 also knew that railroads were subject to regulation not only by states but by the federal government itself, but this fact has been held insufficient to bring to the railroad companies the interpretative exemption from the Sherman Act they have sought.** United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 314, 315, 320-325, 41 L. ed. 1007, 1018, 1019, 1020-1022, 17 S. Ct. 540." (Emphasis added.)

But this Court now indicates that the language is to be much more restrictive and is to be narrowly limited. At p. 9 of the Slip Sheet Opinion, the word "every", which has heretofore been held a key word in the statute, is omitted, and it is said that:

". . . the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-

division agreements, and other similar arrangements." [12]

Prior limitations of the statute's all inclusive language have, apart from the Rule of Reason, had to be brought about by express Congressional enactment. Such limitations have included:

1. The "Miller-Tydings Act", Act of Congress of August 17, 1937, c. 690, 50 Stat. 693, 15 U. S. C. § 1, exempting certain resale pricing agreements.

2. The Clayton Act exemption for legitimate activities of labor organizations. Act of Congress of October 15, 1914, c. 323, 38 Stat. § 731, 15 U. S. C. § 17.

3. The "Capper-Volstead Act", Act of February 18, 1922, c. 57, 42 Stat. 388, 7 U. S. C. § 291, authorizing certain activities of agricultural producer associations.

4. The "McCarran Act", Act of Congress of March 9, 1945, c. 20, 59 Stat. 33, 15 U. S. C., § 1011, exempting insurance business, insofar as regulated by the states.

5. The "Bulwinkle Act", Act of June 17, 1948, c. 491, 62 Stat. 472, 49 U. S. C. § 5(b), exempting certain rate fixing activities of carriers, including the railroads.

6. The "McGuire Act", Act of July 14, 1952, c. 745, 66 Stat. 631, 15 U. S. C. § 45, exempting certain resale pricing agreements.[13]

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12. The combination here employed means no more unusual than those whereby competitors, to restrain a competitor, seek governmental action by enforcing their patent rights in court proceedings, as part of a scheme to eliminate competition. See, e.g., *United States v. Krasnov*, 355 U. S. 5, aff'g 143 F. Supp. 184 (E. D. Pa. 1956).

13. For other Congressionally enacted exemptions see footnote 14, *infra*. See also "The Antitrust Laws, A Basis for Economic Freedom," Staff Report to the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 85th Cong. 2d Sess., Pursuant to H. Res. 107, January 1, 1959, and particularly the statutes set forth in Part III thereof, under the heading "Exception and Exemption."

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, the State of Louisiana clearly attempted to give the holder of a trademark a monopoly even with respect to the non-signer. This Court held that the state law could make legal what is otherwise illegal under the Sherman Act only to the extent that *federal* law amended the Sherman Act.

Congress has enacted no amendment creating an exemption for efforts to secure a monopoly or impose a restraint in interstate commerce, to "cripple" an interstate competitor, as Mr. Cox said (Transcript of Oral Argument, p. 75), through non-federal legislative or executive action, though the *Sisal* case, holding that such activities do fall within the prohibitions of the Sherman Act, has been on the books since 1927, since which time a number of other exemptions have been enacted.[14]

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14. The Court pointed out in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 227 footnote 60, that: ". . . the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. Under the N. I. R. A. this could be done through the code machinery with the approval of the President as provided in §§ 3(a) and 5, *supra*, note 18. Under § 407(8) of the Transportation Act of [February 28] 1920 (41 Stat. at L. 456, 482, chap. 91, 49 USCA § 5(8)) carriers, including certain express companies, which were consolidated pursuant to any order of the Interstate Commerce Commission were relieved from the operation of the Anti-trust laws. And see the Maloney Act (§ 15A of the Securities Exchange Act of 1934 [as amended, June 25, 1938] 52 Stat. at L. 1070, chap. 677, 15 USCA §§ 780-783) providing for the formation of associations of brokers and dealers with the approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations; and the Bituminous Coal Act of [April 26] 1937 (50 Stat. at L. 72, chap. 127, 15 USCA § 828), especially §§ 4 and 12—particularly as they relate to the fixing of minimum and maximum prices by the Bituminous Coal Commission . . ."

## V.

### There Is No Genuine Constitutional Issue in This Case.

In support of its decision, the Court states that:

> ". . . Such a construction of the Sherman Act (holding petitioners liable for their conduct) would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." (Slip Sheet Opinion p. 11)

Apart from the fact that other First Amendment guarantees [15] have been held by the Court not to limit the power to prohibit combinations in restraint of trade, *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, nor, by like token, to limit liability in damages for libelous utterances, see *Roth v. United States*, 354 U. S. 476, 483, the issue in the present case is academic. Petitioners in their Questions Presented raised no constitutional issues (See Transcript of Oral Argument, pp. 17-18). The Court should, therefore, be loath to construe the Act narrowly, out of concern for possible constitutional problems, in favor of parties who have waived the issue, and as to whom, therefore, it is moot.

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15. The Court's statement that the Sherman Act was not meant to cover political activity (Slip Sheet Opinion p. 10) ignores the historical connection between monopoly and political power. An historian of the WHEEL, one of the strongest of the farmers' organizations in the '80's, had this to say about its origin: "The question has often been asked, what gave rise to the Wheel? This question is as easily answered as asked, Monopoly! . . . Monopoly aspires to make the people its servants, *politically*, financially and socially, and demands that we offer on its golden altar all that we are and have, souls, bodies, lives, liberty, and common country, unreservedly and without complaint." Morgan, *History of the Wheel and Alliance* (Fort Scott, Kan. 1889), p. 56. Quoted by this Court in *United States v. Southeastern Underwriters Association*, 322 U. S. 533, 554, footnote 39 (Opinion by Mr. Justice Black).

## CONCLUSION.

Petitioners freely conceded that their activities were intended to cripple Respondents' competition. They also conceded that they sought to obtain their objective by a combination and that such objective would affect commerce among the several states.

The Court has thus by its decision, holding Petitioners' activities immune from the antitrust laws, seriously limited the scope of the Sherman Act, despite its plenary language that "*every* combination . . . in restraint of trade or commerce among the several states . . ." is illegal. Prior limitations or exemptions have been through Congressional enactment. The limitation now imposed by the Court, has no statutory sanction, and conflicts directly with the prior decision of the Court in the *Sisal* case, as well as with the principles of such cases as *Schwegmann*, and *Georgia v. Penna. R. R.* But what is even more basic and affects the very heart of the appellate and reviewing process, the Court did not have to decide that issue, if it had only given due respect to the fundamental findings of fact of the District Court, not questioned by Petitioners. Instead those findings have been ignored, and the Court's decision based on completely different facts from those found.

Respondents accordingly request the right to reargue these issues, because of their overriding importance in the construction of the Sherman Act.

Because of the grave adverse affect of the Court's construction of the Sherman Act upon the enforcement of that Act by the Department of Justice, and because the Department of Justice itself has taken a different view with regard to the scope of the Act, as pointed out above (p. 12, fn. 7), it is respectfully suggested that it would be appropriate for the Court to request the views of the Attorney General on re-hearing, as the Court has done from time to time in recent years where litigation between private parties involved issues of public importance.

The Court has also indicated that its present restricted construction of the Act arises, in part, out of concern lest a broader construction be unconstitutional. In situations where the constitutionality of an Act of Congress affecting the public interest is drawn in question, the Act of Congress of June 25, 1948, c. 646, 62 Stat. 971, 15 U. S. C. § 2403 provides:

> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. . . ."

Respondents respectfully request such certification in this case.

Respectfully submitted,

AARON M. FINE,
HAROLD E. KOHN,
*Attorneys for Respondents.*

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**Certificate of Counsel.**

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

AARON M. FINE,

HAROLD E. KOHN,
*Attorneys for Respondents.*

# SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1960.

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| Eastern Railroad Presidents Conference, et al., Petitioners, v. Noerr Motor Freight, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit. |

[February 20, 1961.]

Mr. Justice Black delivered the opinion of the Court.

American railroads have always largely depended upon income from the long-distance transportation of heavy freight for economic survival. During the early years of their existence, they had virtually no competition in this aspect of their business, but, as early as the 1920's, the growth of the trucking industry in this country began to bring about changes in this situation. For the truckers found, just as the railroads had learned earlier, that a very profitable part of the transportation business was the long hauling of heavy freight. As the trucking industry became more and more powerful, the competition between it and the railroads for this business became increasingly intense until, during the period following the conclusion of World War II, at least the railroads, if not both of the competing groups, came to view the struggle as one of economic life or death for their method of transportation. The present litigation is an outgrowth of one part of that struggle.

The case was commenced by a complaint filed in the United States District Court in Pennsylvania on behalf of 41 Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association. This complaint, which named as defendants 24 Eastern rail-

roads, an association of the presidents of those railroads known as the Eastern Railroad Presidents' Conference, and a public relations firm, Carl Byoir & Associates, Inc., charged that the defendants had conspired to restrain trade in and monopolize the long-distance freight business in violation of §§ 1[1] and 2[2] of the Sherman Act. The gist of the conspiracy alleged was that the railroads had engaged Byoir to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The campaign so conducted was described in the complaint as "vicious, corrupt, and fraudulent," first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business, and secondly, in that the defendants utilized the so-called third-party technique, that is, the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by Byoir and paid for by the railroads.[3] The complaint then went on to supplement these more or less

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U. S. C. § 2.

[3] For a discussion of the mechanics of this technique and the purposes generally underlying its use by public relations firms, see Ross, The Image Merchants, at 118, 226–227 and 266–267.

general allegations with specific charges as to particular instances in which the railroads had attempted to influence legislation by means of their publicity campaign. One of several such charges was that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill," [4] which would have permitted truckers to carry heavier loads over Pennsylvania roads.

The prayer of the complaint was for treble damages under § 4 of the Clayton Act [5] and an injunction restraining the defendants from further acts in pursuance of the conspiracy. Insofar as the prayer for damages was concerned, a stipulation was entered that the only damages suffered by the individual truck operators was the loss of business that resulted from the veto of the "Fair Truck Bill" by the Governor of Pennsylvania, and accordingly the claim for damages was limited to an amount based upon the loss of profits as a result of this veto plus the expenses incurred by the truckers' trade association for the purpose of combatting the railroads' publicity campaign. The prayer for injunctive relief was much broader, however, asking that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organiza-

[4] The "Fair Truck Bill" referred to was introduced in the Pennsylvania Legislature in May 1951, as Senate bill 615.

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

tions to propagate the arguments of the railroads against the truckers or their business, and from doing "any other act or thing to further . . . the objects and purposes" of the conspiracy.

In their answer to this complaint, the railroads admitted that they had conducted a publicity campaign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations, but they denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers. Rather, they insisted, the campaign was conducted in furtherance of their rights "to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the costs of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create . . . ." Such a campaign, the defendants maintained, did not constitute a violation of the Sherman Act, presumably because that Act could not properly be interpreted to apply either to restraints of trade or monopolizations that result from the passage or enforcement of laws or to efforts of individuals to bring about the passage or enforcement of laws.[6]

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[6] The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment and the contention that the truckers were barred from prosecuting this suit by reason of the fact that they had themselves engaged in conduct identical to that about which they were complaining

Subsequently, defendants broadened the scope of the litigation by filing a counterclaim in which they charged that the truckers had themselves violated §§ 1 and 2 of the Sherman Act by conspiring to destroy the railroads' competition in the long-distance freight business and to monopolize that business for heavy trucks. The means of the conspiracy alleged in the counterclaim were much the same as those with which the truckers had charged the railroads in the original complaint, including allegations of the conduct of a malicious publicity campaign designed to destroy the railroads' business by law, to create an atmosphere hostile to the railroads among the general public, and to interfere with relationships existing between the railroads and their customers. The prayer for relief of the counterclaim, like that of the truckers' original complaint, was for treble damages and an injunction restraining continuance of the allegedly unlawful practices. In their reply to this counterclaim, the truckers denied each of the allegations that charged a violation of the Sherman Act and, in addition, interposed a number of affirmative defenses, none of which are relevant here.

In this posture, the case went to trial. After hearings, the trial court entered a judgment, based upon extensive findings of fact and conclusions of law, that the railroads' publicity campaign had violated the Sherman Act while that of the truckers had not.[7] In reaching this conclusion, the trial court expressly disclaimed any purpose to condemn as illegal mere efforts on the part of the railroads to

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with regard to the railroads and were thus in *pari delicto*. Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.

[7] The opinion of the District Court on the merits of the controversy is reported at 155 F. Supp. 768. An additional opinion dealing with the question of relief is reported at 166 F. Supp. 163. For reports of earlier opinions dealing with preliminary motions, see 113 F. Supp. 737, 14 F. R. D. 189, and 19 F. R. D. 146.

influence the passage of new legislation or the enforcement of existing law. Instead, it rested its judgment upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third-party technique;[8] and, secondly, that the railroads' campaign also had as an important, if not overriding, purpose the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law. In line with its theory that restraints of trade and monopolizations resulting from valid laws are not actionable under the Sherman Act, however, the trial court awarded only nominal damages to the individual truckers, holding that no damages were recoverable for loss of business due to the veto of the Pennsylvania "Fair Truck Bill." The judgment did, however, award substantial damages to the truckers' trade association as well as the broad injunction asked for in the complaint.[9]

The conclusion that the truckers' publicity campaign had not violated the Sherman Act was reached despite findings that the truckers also had engaged in a publicity campaign designed to influence legislation, as charged in

[8] The District Court did not expressly find that any particular part of the railroads' publicity campaign was false in its content. Rather, it found that the technique of the railroads was "to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood." 155 F. Supp., at 814.

[9] If anything, the injunction was even broader than had been requested in the complaint for it effectively enjoined the defendants from any publicity activities against the truckers whether or not the third-party technique was used. See 166 F. Supp., at 172–173.

the counterclaim, and despite findings that the truckers had utilized the third-party technique in this campaign. Resting largely upon the fact that the efforts of the truckers were directed, at least for the most part,[10] at trying to get legislation passed that was beneficial to them rather than harmful to the railroads, the trial court found that the truckers' campaign was purely defensive in purpose and concluded that the truckers' campaign differed from that of the railroads in that the truckers were not trying to destroy a competitor. Accordingly, it held that the truckers' campaign, though technically in restraint of trade, was well within the rule of reason which governs the interpretation of §§ 1 and 2 of the Sherman Act and consequently dismissed the counterclaim.

The railroads appealed from this judgment, both as to the conclusion that they had violated the Sherman Act as charged in the original complaint and as to the conclusion that the truckers had not violated the Act as charged in the counterclaim. The Court of Appeals for the Third Circuit, one judge dissenting in part, upheld the judgment of the District Court in every respect, stating that the findings amply support the judgment and that there was

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[10] The trial court did recognize that on at least one occasion the truckers attempted to encourage legislation that would have been directly harmful to the railroads rather than beneficial to themselves. Thus, the court found: "About the middle of the decade [the 1940's] PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc." The trial court found, however, that this action of the truckers also lay within the rule of reason because "the truckers had been the target of a strong compaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes," thus making it necessary for the truckers to "be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers." 155 F. Supp., at 803.

sufficient evidence to support all of the findings.[11] This was followed by a petition for certiorari filed on behalf of the railroads and Byoir limited to the question of the correctness of the judgment insofar as it held that they had violated the Sherman Act. Because the case presents a new and unusual application of the Sherman Act and involves severe restrictions upon the rights of these railroads and others to seek the passage or defeat of legislation when deemed desirable, we granted that petition.[12]

We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United States*,[13] that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." [14] Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.[15] These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legisla-

[11] 273 F. 2d 218. Chief Judge Biggs dissented from the opinion of the majority of the Court of Appeals insofar as it upheld the District Court's conclusion that the railroads and Byoir had violated the Sherman Act. For similar reasons, he concurred in that part of the majority opinion which upheld the conclusion that the truckers had not violated the Act.

[12] 362 U. S. 947.

[13] 221 U. S. 1, at 51–62.

[14] *Id.*, at 57.

[15] *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Parker* v. *Brown*, 317 U. S. 341.

tive or executive branches of government so long as the law itself does not violate some provision of the Constitution.

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.[16] This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade.

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[16] See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 491–493.

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.[17] Secondly, and of at least equally significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one

[17] In *Parker* v. *Brown*, *supra*, this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program's validity under the Sherman Act was affected by the nature of the political support necessary for its implementation—a contention not unlike that rejected here. The reasoning underlying that conclusion was stated succinctly by Mr. Chief Justice Stone: "Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 317 U. S., at 352.

of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. We are thus called upon to consider whether the courts below were correct in holding that, notwithstanding this principle, the Act was violated here because of the presence in the railroads' publicity campaign of additional factors sufficient to take the case out of the area in which the principle is controlling.

The first such factor relied upon was the fact, established by the finding of the District Court, that the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. But we do not see how this fact, even if adequately supported in the record,[18] could transform conduct otherwise lawful into a violation of the Sherman Act. All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their rep-

[18] A study of the record reveals that the only evidence or subsidiary findings upon which this conclusory finding could be based is the undisputed fact that the railroads did seek laws by arguments and propaganda that could have had the effect of damaging the competitive position of the truckers. There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement. We nonetheless accept the finding of the District Court on this issue for, in our view, the disposition of this case must be the same regardless of that fact.

resentatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in *United States* v. *Rock Royal Co-op*, where it was said: "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act . . . ." [10] Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business

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[10] 307 U. S. 533, 560.

conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations,[20] is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.[21] All of this caution would go for naught if we permitted

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[20] The extent to which the third-party technique is utilized in the public relations field is demonstrated by the fact, found by the District Court, that each of the several public relations firms interviewed by the railroads before they finally decided to hire the Byoir organization to conduct their publicity campaign included the use of this technique in its outline of proposed activities submitted for consideration by the railroads. See 155 F. Supp., at 778.

[21] See, *e. g., United States* v. *Harriss*, 347 U. S. 612. Cf. *United States* v. *Rumely*, 345 U. S. 41.

an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Moreover, we think the courts below themselves recognized this fact to some extent for their disposition of the case is inconsistent with the position that the use of the third-party technique alone could constitute a violation of the Sherman Act. This much is apparent from the fact that the railroads' counterclaim against the truckers was not allowed. Since it is undisputed that the truckers were as guilty as the railroads of the use of the technique,[22] this factor could not have been in any sense controlling of the holding against the railroads. Rather, it appears to have been relied upon primarily as an indication of the vicious nature of the campaign against the truckers. But whatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

In addition to the foregoing factors, both of which relate to the intent and methods of the railroads in seeking gov-

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[22] The District Court expressly recognized this fact in its opinion: "The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique." 155 F. Supp., at 816. This conclusion was amply supported by specific findings. Thus, the court found: "The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon." 155 F. Supp., at 803.

ernmental action, the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was "more than merely an attempt to pass legislation. It was the purpose and intent . . . to hurt the truckers in every way possible, even though they secured no legislation." Specifically, the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be weakened, and that the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above. But, this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the

truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen.[23] Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury is no different than the issue presented by the factors already discussed. It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is

[23] Here again, the petitioners have leveled a vigorous attack upon the trial court's findings. As a part of this attack, they urge that there is no basis in reason for the finding that some shippers quit doing business with the truckers as a result of the railroads' publicity campaign. Their contention is that since the theme of the campaign was that the truckers had an unfair competitive advantage and could consequently charge unfairly low prices, the campaign would have encouraged, rather than discouraged, shippers who availed themselves of the truckers' services. This argument has considerable appeal but, as before, we find it unnecessary to pass upon the validity of these findings for we think the conclusion must be the same whether they are allowed to stand or not.

not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner prescribed by the Sherman Act is involved in this case.

In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case—a "no-holds-barred fight",[24] between two industries both of which are seeking control of a profitable source of income.[25] Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.

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[24] We borrow his phrase from the dissenting opinion below of Chief Judge Biggs.

[25] Since the commencement of this litigation, a new bill increasing truck-weight limits has passed the Pennsylvania Legislature and has become law by virtue of the Governor's approval. Thus, the fight goes on.

That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. Since the railroads have acquiesced in the dismissal of their counterclaim by not challenging the Court of Appeals' affirmance of that order in their petition for certiorari, we are here concerned only with those parts of the judgments below holding the railroads and Byoir liable for violations of the Sherman Act. And it follows from what we have said that those parts of the judgments below are wrong. They must be and are

*Reversed.*